

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AM GENERAL LLC,

Plaintiff,

v.

ACTIVISION BLIZZARD, INC.,
ACTIVISION PUBLISHING, INC., and
MAJOR LEAGUE GAMING CORP.,

Defendants.

CASE NO. 1:17-cv-08644-GBD

**DECLARATION OF JAMES BERKLEY
IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

I, James Berkley, declare as follows:

1. I am employed as a Senior Research Analyst at Mitchell Silberberg & Knupp LLP (“MSK”), counsel for Defendants in this matter. Since on or about February 4, 2018, I have been tasked with investigation of the factual background of this action with respect to HMMWV (or “Humvee”) military vehicles as used by the United States military and the depiction of such vehicles in video games, other audiovisual and literary works, and other publicly available sources. I have also been tasked with the identification, acquisition, and preservation of evidence pertaining to the foregoing, including the supervision of others in these activities. I have personal knowledge of the following facts and, if called as a witness, could and would competently testify thereto.

I. Evidence Relating to the *Call of Duty* Games

2. As part of my responsibilities in connection with this matter, I participated in and supervised the collection of evidence relating to the content of video games in Activision’s *Call of Duty* series, which I understand are alleged by Plaintiff AM General LLC (“AM General”) to infringe AM General’s alleged trademark and trade dress rights (hereafter, the “Call of Duty Games”). An employee of Mitchell Silberberg & Knupp working under my supervision and direction was tasked with creating video documentation depicting representative “playthroughs” of campaign levels and/or multiplayer maps within the Call of Duty Games that in any manner depicted one or more Humvee vehicles. Instructions were provided to this employee to accurately and without bias capture all elements of gameplay that would be reasonably encountered by a typical player during play involving these respective campaign levels and maps.

3. Attached hereto as **Video Exhibit A**, submitted under separate cover on a USB Flash drive, are true and correct copies of video footage of gameplay from the Call of Duty Games collected in the manner described in the preceding paragraph, captured and preserved on dates between on or about January 4, 2019 and January 10, 2019.

II. Background Concerning HMMWV Military Vehicles

4. Another type of evidence collection conducted by MSK for this matter involved the collection of publicly available materials relating to background information concerning Humvee military vehicles, including documents available on U.S. government and military websites as well as websites maintained by AM General.

(a) Materials on U.S. Government and U.S. Military Websites

5. Attached hereto as **Exhibit 1** is a true and correct copy of a document printed from a U.S. Army website which I accessed and caused to be printed from the Internet Uniform Resource Locator (“URL”) <http://www.peocscss.army.mil/pddltv.html> on or about October 24, 2018. *Inter alia*, this web page refers to “the Army’s High Mobility, Multipurpose Wheeled Vehicle (HMMWV, pronounced ‘Humvee’) family of vehicles,” stating that the “versatile HMMWV is the Army’s ubiquitous vehicle” and is “the Army’s (and other Services’) primary light wheeled vehicle for combat, combat support, and combat service support missions.”

6. Attached hereto as **Exhibit 2** is a true and correct copy of a web page printed from a U.S. Army website titled “HIGH MOBILITY MULTIPURPOSE WHEELED VEHICLE (HMMWV)” which I accessed and caused to be printed from the URL <https://asc.army.mil/web/portfolio-item/cs-css-high-mobility-multipurpose-wheeled-vehicle-hmmwv/> on or about October 24, 2018.

7. Attached hereto as **Exhibit 3** is a true and correct copy of a web page available on the website of the U.S. Army titled “HMMWV,” which I accessed and caused to be printed from the URL <https://www.army.mil/article/3091/hmmwv> on or about October 24, 2018.

8. Attached hereto as **Exhibit 4** is a true and correct copy of a press release available on the official website of the United States Embassy in Kosovo, which I accessed and caused to be printed on or about October 27, 2018 from the URL <https://xk.usembassy.gov/ambassador-delawies-remarks-at-the-am-general-gok-signing-ceremony/>. *Inter alia*, this page states: “The Humvee has a long, proud history in serving American and NATO forces. In service for some 30 years, it has become a ubiquitous symbol of American ground forces.”

9. Attached hereto as **Exhibit 5** are true and correct copies of excerpts from The U.S. Army *Weapon Systems Handbook* for the year 2007-2008, which I accessed and caused to be downloaded on or about December 3, 2018 via the URL <https://asc.army.mil/docs/wsh2/2007-wsh.pdf>. *Inter alia*, this document states on page 120 that “The High Mobility Multipurpose Wheeled Vehicle (HMMWWV) is a tri-service program that provides light, highly mobile, diesel-powered, four-wheel-drive vehicles to satisfy Army, Marine Corps, and Air Force requirements.”

(b) Materials Available on AM General Websites

10. Another type of evidence collected by MSK for this matter involved the documentation of materials found on Plaintiff AM General’s current and former websites.

11. Attached hereto as **Exhibit 6** is a true and correct copy of an archived page from the AM General website which I accessed and caused to be printed on or about October 27, 2018 from the URL <http://www.amgeneral.com/news-events/news/us-senator-todd-young-tours-am-general-hmmwv-assembly-plant-and-highlights-the-strength-of-american-workers-and-products/>.

Among other things this page contains the assertion that HMMWV vehicles are an “essential part of US military operations.”

12. Attached hereto as **Exhibit 7** is a true and correct copy of a document titled “Company Profile” available from the archived AM General website via the URL <https://web.archive.org/web/20090306162653/http://www.amgeneral.com:80/files/amgeneral-profile.pdf>, which I accessed and caused to be downloaded on or about August 28, 2018. *Inter alia*, this document states on page 4 that HMMWV vehicles have been “the mainstay light tactical vehicle for our armed forces,” and that “[a]s a cargo or troop carrier, weapons carrier, communications shelter carrier, ambulance, artillery prime mover or systems platform, the HMMWV is as basic to US military operations as MREs and muddy boots.”

13. Attached hereto as **Exhibit 8** is a true and correct copy of a page available on the archived website of AM General titled “Features & Design,” which I accessed and caused to be printed on or about August 29, 2018 from the Internet Archive URL <https://web.archive.org/web/20081012003908/http://www.amgeneral.com:80/vehicles/hmmwv/features.php>. I understand this page was archived on or about October 12, 2008. *Inter alia*, it states “The [HMMWV] vehicle was designed for the world's toughest environment — war. Its looks are a result of its requirements. It is a pure example of form following function.”

14. Attached hereto as **Exhibit 9** is a true and correct copy of a web page of “frequently asked questions” from the archived Hummer.com website in or about May 1998, which I accessed and caused to be printed on or about March 7, 2019 from the Internet Archive at the URL <https://web.archive.org/web/19980525113714/http://www.hummer.com:80/civilian/new/faq.html>. I understand this page to have been archived on or about May 25, 1998, prior to AM General’s

sale of the “Hummer” brand to General Motors. *Inter alia*, this page states that “The civilian Hummer has the same basic design and components as the Humvee military truck,” and that the design “enabled a manufacturer...to meet a long list of requirements provided by the U.S. Army. To alter this configuration would compromise the requirements for the Army.”

III. Evidence Relating to Third-Party Video Games

15. As part of my work on this matter, I also compiled and supervised others in the compiling of evidence pertaining to depictions of military Humvee vehicles in other, non-*Call of Duty* video games produced and distributed by third parties, including both commercial video game publishers and the U.S. Army (hereafter, the “Third Party Games”).

16. Toward this end, I and others working under my direction acquired full physical and/or digital copies of a significant number of Third Party Games. These games were either purchased through commercial websites such as Amazon.com and eBay or through commercial video game platforms such as Valve Corporation’s “Steam” store, which is available online at <https://store.steampowered.com>.¹ Additionally, I and those working under my direction compiled and documented examples of publicly available trailers and marketing materials for Third Party Games that include depictions of military Humvee vehicles.

17. A number of Third Party Games acquired by MSK in the manner discussed above include depictions of HMMWV military vehicles on their exterior packaging and/or on commercial web pages offering the games for sale. For example, attached hereto as **Exhibit 10** are true and correct copies of such physical packaging materials that depict Humvee vehicles, as acquired by me and/or others working under my direction during the pendency of this matter.

¹ Should the Court so request, copies of the Third Party Games, as well as motion pictures, television programs, and books detailed here and below can be made available to the Court’s chambers.

18. Attached hereto as **Exhibit 11** are true and correct copies of examples of relevant excerpts from commercial web pages depicting Humvee vehicles in connection with the Third Party Games, which were printed and/or captured by me or others working under my direction from the URLs indicated on each page on or about the dates indicated.

19. Under my supervision and direction, each of the Third Party Games acquired in the manner described above was played by an employee of MSK trained and proficient in the collection of audiovisual and video game-related evidence. When relevant, screenshots and video captures of gameplay documenting the depiction of military Humvee vehicles in the Third Party Games were preserved by this individual acting under my supervision and direction.

20. Attached hereto as **Exhibit 12** are true and correct copies of examples of screenshots and related identifying materials from Third Party Games collected by MSK in the manner described above on dates between on or about August 13, 2018 and April 6, 2019. These images have been arranged such that on each page, there is a screenshot of the relevant Game's title screen or other identifying information (e.g. its packaging), followed by a screenshot providing an example of the Game's depiction of or reference to Humvee vehicles.

21. Attached hereto as **Video Exhibit B**, submitted on a USB flash drive under separate cover, are true and correct copies of digital video files documenting gameplay from Third Party Games preserved by MKS in the above-described manner, captured on dates between on or about August 31, 2018 and December 20, 2018.

22. Attached hereto as **Exhibits 13 and 14**, respectively, are (1) true and correct copies of the physical packaging of copies of Third Party Games acquired by MSK as referenced in the preceding paragraphs, or (2) where Third Party Games were acquired digitally, true and correct copies of excerpted web pages on the "Steam" platform from which the game is made

available to the public, which were respectively accessed and printed by me and/or under my direction from the indicated URLs on or about the dates shown on each page.

23. In the course of collecting the above-described evidence, I became aware that Humvee vehicles have frequently been depicted in audiovisual trailers for Third Party Games. Attached hereto and as **Exhibit 15** are true and correct copies of screenshots of web pages displaying audiovisual trailers for various Third-Party Games. These screenshots were collected by me and/or others working under my direction and supervision from the respectively indicated URLs on dates between on or about November 19, 2018 and December 7, 2018.

24. Attached hereto as **Video Exhibit C**, submitted on a USB flash drive under separate cover, are true and correct digital copies of audiovisual trailers for the Third Party Games referenced in the preceding exhibit, which were downloaded and preserved by me and/or under my direction from their respective Internet locations on dates between on or about November 17, 2018 and December 10, 2018.

25. During the course of this matter I also became aware that various strategy guides were published in book form pertaining to Third Party Games, including books that depict and refer to Humvee military vehicles. For example, attached hereto as **Exhibit 16** are true and correct copies of excerpts from *Socom 3: U.S. Navy Seals: The Official Guide*, followed by true and correct copies of excerpts from the PRIMA Office Game Guide for *Battlefield 2: Modern Combat*.

26. Attached hereto as **Exhibit 17** are true and correct copies of examples of supplemental or “bonus” materials available via the Steam online store with purchase of “Arma X: Anniversary Collection,” which were acquired and documented under my direction on or about September 7, 2018.

27. Attached hereto as **Exhibit 18** are true and correct copies of relevant excerpts of additional examples of online publications and websites depicting or discussing Humvee vehicles in connection with various Third Party Games, which were respectively accessed and printed by me and/or under my direction on or about the indicated dates from the URLs indicated on each page.

IV. Evidence Relating to Motion Pictures and Television Programs

28. As part of my responsibilities for this matter, I and those working under my supervision and direction also acquired and documented examples of motion pictures and television programs depicting military Humvee vehicles, including motion pictures and television programs where military Humvee vehicles are depicted in the works' trailers or other marketing materials.

29. A number of motion pictures and television programs documented and/or acquired by MSK in the manner discussed above include depictions of HMMWV military vehicles on their exterior DVD packaging and/or on commercial web pages offering the works for sale.

30. For example, attached hereto as **Exhibit 19** are true and correct copies of DVD packaging materials for various motion pictures and television programs acquired by me and/or others working under my direction, copies of which have been produced in this matter.²

31. Attached hereto as **Exhibit 20** are true and correct screenshots of web pages displaying publicly available video trailers for various motion pictures and television programs, including portions of these trailers that depict military Humvee vehicles. These screenshots were

² As noted above, copies of physical DVDs containing motion pictures and television programs produced in this matter can be provided to the Court's chambers upon request.

collected by me and/or others working under my direction and supervision from their respectively indicated URLs on dates between on or about October 29, 2018 and May 27, 2019.

32. Attached hereto as **Exhibit 21** is a true and correct copy of a web page on the IMDb.com website offering a trailer for the television series “The Long Road Home,” which I accessed and caused to be printed from the indicated URL on or about February 10, 2019.

33. Attached hereto as **Video Exhibit D**, submitted on a USB flash drive under separate cover, are true and correct digital copies of video trailers for movies and television programs referenced in the two preceding paragraphs and exhibits, which were downloaded and preserved by me and/or under my direction from the URLs where documented by MSK on dates between on or about October 31, 2018 and January 8, 2019.

34. Attached hereto as **Exhibit 22** are true and correct copies of images available on the Amazon.com website in connection with the 2018 film *15:17 to Paris*, which I accessed and caused to be printed from the indicated URLs on or about March 4, 2019.

35. Attached hereto as **Exhibit 23** are true and correct copies of screenshots from the website HBO.com regarding the television series *Generation Kill*, which I accessed and caused to be captured from the indicated URLs on or about October 29, 2018.

36. Attached hereto as **Exhibit 24** is a true and correct copy of a depiction of a poster promoting the HBO series *Generation Kill*, which I accessed and caused to be printed on or about January 6, 2019 from the URL

https://66.media.tumblr.com/f56ba8e0a82cb1ca68f2e4fb910d1ed8/tumblr_ne2132oZ3Q1qzenn7o1_400.jpg.

37. Attached hereto as **Exhibit 25** is a true and correct copy of a Facebook web page and accompanying image for the 2017 film *Whiskey Tango Foxtrot*, which I accessed and caused to be printed from the indicated URLs on or about January 6, 2019.

38. Attached hereto as **Exhibit 26** are true and correct copies of screenshots of web pages available on the website www.nationalgeographic.com regarding the television series *The Long Road Home*, which I accessed and caused to be printed from the indicated URL on or about February 10, 2019.

39. Attached hereto and as **Exhibit 27** are true and correct screenshots and/or printouts of web pages documenting other depictions of Humvee vehicles in connection with various motion pictures and television programs, including photographs displayed in conjunction with such works on websites such as the Internet Movie Database, also known as “IMdB.” These screenshots and printouts were collected by me and/or others working under my direction and supervision from the respectively indicated URLs on dates between on or about August 13, 2018 and April 5, 2019.

40. Attached hereto as **Exhibit 28** are true and correct screenshots of depictions of military HMMWV vehicles in television programs not already referenced in the preceding exhibits, including from *The Simpsons*, *The Andromeda Strain*, *King of the Hill*, and *Family Guy*, followed by true and correct copies of the respective DVD packaging for these works as produced in this action.

V. Evidence Relating to Music Videos

41. As part of my work on this matter, I also documented the depiction of military Humvee vehicles in connection with music videos associated with popular music artists.

42. Attached here to as **Exhibit 29** are true and correct screenshots from a music video titled “Thirty Seconds to Mars – This Is War,” which I accessed and caused to be captured on or about October 30, 2018 from the URL <https://www.youtube.com/watch?v=Zcps2fJKuAI>. According to YouTube this video had been viewed more than 92 million times.

43. Attached here to as **Exhibit 30** are true and correct screenshots from a music video titled “Green Day – Wake Me Up When September Ends [Official Music Video]” which I accessed and caused to be captured on or about October 30, 2018 from the URL <https://www.youtube.com/watch?v=NU9JoFKlaZ0>. According to YouTube this video had been viewed more than 130 million times.

44. Attached hereto as **Video Exhibit E**, provided on a USB flash drive under separate cover, are true and correct digital copies of the music videos referenced in Exhibits 29 and 30, which were preserved under my direction on or about October 31, 2018 from the URLs indicated in the preceding paragraphs.

VI. Evidence Relating to Promotional Use by the U.S. Government

45. Another part of my work on this matter has involved the documentation of uses of Humvee vehicles by the U.S. government and military in connection with promotional and recruiting efforts.

46. Attached hereto as **Exhibit 31** are true and correct screenshots from web pages depicting episodes of a television series titled “Starting Strong,” available to the public on the

YouTube account of GoArmy.com, which I accessed and caused to be printed from the respectively shown URLs on or about December 3, 2018.

47. Attached hereto as **Exhibit 32** is a true and correct copy of a web page titled “Starting Strong available on the website of the U.S. Army at www.army.mil,” which I accessed and caused to be printed on or about May 16, 2019 from the URL https://www.army.mil/standto/archive_2013-05-29. *Inter alia*, this page, dated May 29, 2013, states that “Starting Strong” is “a reality-TV inspired branded television series created by the U.S. Army” which was to be aired on “FOX affiliates in key media markets throughout the country.”

48. Attached hereto as **Exhibit 33** is a true and correct copy of a web page and an associated video titled “Bigger Picture of Being A Soldier: Army Overview,” which I accessed and caused to be printed on or about December 3, 2018 from the URL <https://www.goarmy.com/videos/play/bigger-picture-of-being-a-slider-army-overview.html>.

49. Attached hereto as **Exhibit 34** are true and correct copies of web pages and associated vides available on the YouTube channel “GoArmy.com,” respectively titled “U.S. Army Commercial: ‘Narrative 2’” and “#PartTimeAllSoldier – U.S. Army Reserve :30 Commercial,” which I accessed and caused to be captured on or about January 6, 2019, from the URLs identified respectively on each page.

50. Attached hereto as **Exhibit 35** are true and correct copies of screenshots and printouts of photographs documenting Army recruitment activities made available on the Twitter accounts “armysmithtown,” “ssg_jay,” and “ArmyRecruitingWausau,” which I accessed and caused to be captured via the indicated URLs on or about February 7, 2018.

51. Attached hereto as **Exhibit 36** is a true and correct copy of a web page titled “A visitor poses with US Army special forces soldiers at the 2006... News Photo,” which I accessed and caused to be printed from the GettyImages.com website on or about December 12, 2018 from the URL <https://www.gettyimages.com/detail/news-photo/los-angeles-united-states-a-visitor-poses-with-us-army-news-photo/57587207>.

52. Attached hereto as **Exhibit 37** is a true and correct copy of an article on the website of the U.S. Army titled “Virtual Experience Lets Civilians Act as Soldiers,” dated February 27, 2007, which I accessed and caused to be printed on or about April 2, 2019 from the URL https://www.army.mil/article/2005/virtual_experience_lets_civilians_act_as_soldiers.

53. Attached hereto as **Exhibit 38** is a true and correct copy of a photograph available on the website of the U.S. Army which I accessed and caused to be printed on or about May 16, 2019 from the URL <https://www.army.mil/e2/-images/2007/02/27/2904/size0-army.mil-2007-02-27-121635.jpg>.

54. Attached hereto as **Exhibit 39** is a true and correct copy of an archived article from the website of the U.S. Army including the photograph displayed in Exhibit 38 above, which I accessed and caused to be printed on or about April 3, 2019 from the URL <https://web.archive.org/web/20151029183251/http://www.army.mil/media/5716/>.

55. Attached hereto as **Exhibit 40** is a true and correct copy of an archived version of an article titled “US Army Invades E3,” dated May 20, 2005, which I accessed and caused to be printed on or about April 3, 2019 from the URL <https://web.archive.org/web/20051113195024/http://pcworld.com/news/article/0,aid,120929,00.asp>.

56. Attached hereto as **Exhibit 41** are true and correct copies of an article and associated photographs titled “Virtual Army Experience a big hit at the Joint Service Open House,” dated May 16, 2010, which I accessed and caused to be printed on or about February 6, 2018 from a website of the United States Air Force at the URL <https://www.jba.af.mil/News/Article/335582/virtual-army-experience-a-big-hit-at-the-joint-service-open-house/>.

57. Attached hereto as **Exhibit 42** are true and correct copies of screenshots obtained from materials included within the video game *America’s Army: True Soldiers* relating to the Army’s “Virtual Army Experience,” which were obtained by an individual working under my direction on or about November 28, 2018.

58. Attached hereto as **Video Exhibit F**, submitted on a USB flash drive under separate cover, is a true and correct copy of a video capturing the materials referenced in the preceding paragraph from *America’s Army: True Soldiers*, preserved by the same individual working under my direction on or about November 28, 2018.

59. Attached hereto as **Exhibit 43** are true and correct copies of covers and pages of a comic-book style U.S. Army publication known as “The Preventative Maintenance Monthly” dated between January 2004 and March 2015, which I accessed and caused to be downloaded via the Army’s website at <https://www.logsa.army.mil/#/psmag> on about December 15, 2018. As designated on their covers these publication were “Approved for Public Release” with unlimited distribution.

VII. Evidence Relating to Books and Related Media

60. As another part of my work on this matter, I and others working under my direction documented and collected evidence regarding depictions of Humvee military vehicles in books (including on book covers) and in related media.

61. Attached hereto as **Exhibit 44** are true and correct copies of books depicting Humvee military vehicles on their covers and/or referring to Humvee military vehicles in their titles that were acquired by MSK and produced in this action.³

62. Attached hereto as **Exhibit 45** are true and correct copies of excerpts from books in various fiction and non-fiction genres referring in their texts to Humvee vehicles. For purposes of convenience various (but not all) references to Humvee vehicles within these excerpts are indicated by red boxes.

63. Attached hereto as **Exhibit 46** are true and correct copies of excerpts from comic books or comic-related art displayed online depicting or referring to Humvee vehicles, which I accessed and caused to be printed on or about December 17, 2018 and February 7, 2019 from the respective URLs shown on each page.

VIII. General Motors and Civilian “Hummer” Vehicles

64. As another part of my work on this matter, I and others working under my direction documented and collected evidence relating to the civilian vehicle known as the “Hummer” or “Hummer H1.”

65. Attached hereto as **Exhibit 47** is a true and correct copy of an archived web page from the Hummer.com website which I accessed and caused to be printed on or about November

³ As noted above, physical copies of the books referenced herein can be provided to the Court’s chambers upon request.

2, 2018 from the Internet Archive at the URL

<https://web.archive.org/web/20000304222459fw/http://hummer.com:08/civilian/new/faq.html>.

Inter alia, this page states: “The U.S. Army had a long list of requirements to meet. To meet them, the vehicle pretty much had to look a lot like it does.”

66. Attached hereto as **Exhibit 48** is a true and correct copy of an archived web page from the Hummer.com website titled “HUMMER 4 Door Slant Back,” which I accessed and caused to be printed on or about October 17, 2018 from the URL

<https://web.archive.org/web/20010809091948/http://www.hummer.com:80/h1/4dsb/byohummer/index.asp>.

67. During the course of this action I found it was possible to locate many examples of the “Hummer Hero” toy depicted in Exhibit 5 to the Deposition of Michael Gard, which I understand was sold with McDonalds restaurant “Happy Meals” in or about the year 2006. Attached hereto as **Exhibit 49** is a true and correct copy of a photograph taken under my direction depicting one such example of these toys, which were acquired by MSK and produced in this matter.

68. Attached hereto as **Exhibit 50** is a true and correct copy of an article titled “Get a Hummer in Your Happy Meal,” dated August 3, 2006, which I accessed and caused to be printed from the URL <https://www.autoblog.com/2006/08/03/get-a-hummer-in-your-happy-meal/> on or about March 2, 2019.

69. In the course of my investigation for this matter I determined that numerous other toys have been sold, and continue to be sold, depicting “slantback” models of vehicles described as General Motors “Hummers” or “Hummer H1s.”

70. Attached hereto as **Exhibit 51** are true and correct copies of photographs of toy vehicles identified as GM-associated “Hummers” or “Hummer H1s” that were purchased by MSK and of which exemplars were produced in this action, followed by true and correct copies of examples of web pages offering such toys for sale, which were accessed and printed by me from the indicated URL on or about March 2, 2019 and December 17, 2018.

71. Attached hereto as **Exhibit 52** are true and correct copies of pages available on the website of Jada Toys Inc. relating to its “2006 Hummer H1” toys, which I accessed on the website www.jadatoyssinc.com and printed from the indicated URLs on or about March 2, 2019.

72. Attached hereto as **Exhibit 53** is a true and correct copy of a recorded assignment of intellectual property rights that I accessed and caused to be downloaded via the website of the U.S Patent and Trademark Office on or about November 3, 2018.

73. Attached hereto as **Exhibit 54** is a true and correct copy of U.S. Trademark Registration No. 2,985,018, registered August 16, 2005, which I accessed and caused to be downloaded from the website of the U.S. Patent and Trademark Office on or about May 23, 2019 from the URL <http://tsdr.uspto.gov/documentviewer?caseId=sn78302130&docId=ORC20050816061414#docIndex=6&page=1>.

74. Attached hereto as **Exhibit 55** is a true and correct copy of a page from the website of the United States Patent and Trademark Office at <http://tmsearch.uspto.gov> reflecting the history of U.S. Trademark Registration No. 2,985,018, which I accessed and caused to be printed from the indicated URL on or about May 23, 2019. The Registrant and Last Listed Owner of this registration are listed respectively on this page as General Motors Corporation and General Motors LLC.

75. Attached hereto as **Exhibit 56** is a true and correct copy of U.S. Trademark Registration No. 2,982,889, registered August 9, 2005, which I accessed and caused to be downloaded from the website of the U.S. Patent and Trademark Office on or about May 23, 2019 from the URL <http://tsdr.uspto.gov/documentviewer?caseId=sn78297369&docId=ORC20050809055751#docIndex=1&page=1>.

76. Attached hereto as **Exhibit 57** is a true and correct copy of a page from the website of the United States Patent and Trademark Office at <http://tmsearch.uspto.gov> reflecting the history of U.S. Trademark Registration No. 2,982,889, which I accessed and caused to be printed from the indicated URL on or about May 23, 2019. The Registrant and Last Listed Owner of this registration are listed respectively on this page as General Motors Corporation and General Motors LLC.

77. Attached hereto as **Exhibit 58** is a true and correct copy of U.S. Trademark Registration No. 2,642,917, registered October 29, 2002 which I accessed and caused to be downloaded from the website of the U.S. Patent and Trademark Office on or about May 28, 2019 from the URL <http://tsdr.uspto.gov/documentviewer?caseId=sn78056450&docId=ORC20071210170621#docIndex=8&page=1>.

78. Attached hereto as **Exhibit 59** is a true and correct copy of a page from the website of the United States Patent and Trademark Office at <http://tmsearch.uspto.gov> reflecting the history of U.S. Trademark Registration No. 2,642,917, which I accessed and caused to be printed from the indicated URL on or about May 28, 2019. The Registrant and Last Listed

Owner of this registration are listed respectively on this page as General Motors Corporation and General Motors LLC.

79. Attached hereto as **Exhibit 60** is a true and correct copy of U.S. Trademark Registration No. 2,659,456, registered December 10, 2002 which I accessed and caused to be downloaded from the website of the U.S. Patent and Trademark Office on or about May 28, 2019 from the URL

<http://tsdr.uspto.gov/documentviewer?caseId=sn78056443&docId=ORC20071220191811#docIndex=7&page=1>.

80. Attached hereto as **Exhibit 61** is a true and correct copy of a page from the website of the United States Patent and Trademark Office at <http://tmsearch.uspto.gov> reflecting the history of U.S. Trademark Registration No. 2,659,456, which I accessed and caused to be printed from the indicated URL on or about May 28, 2019. The Registrant and Last Listed Owner of this registration are listed respectively on this page as General Motors Corporation and General Motors LLC.

IX. Additional Evidence of Functionality and Non-Distinctiveness

81. As another part of my work on this matter, I also documented and collected evidence relating to the functional purpose and non-distinctiveness of AM General's alleged trade dress and the component parts thereof. In part such evidence could be found on AM General websites and related documents of AM General and General Motors as already described above. In addition, I assembled further evidence on these topics from the U.S. Patent and Trademark Office as well as other documents in the public domain.

82. Attached hereto as **Exhibit 62** is a true and correct copy of United States Patent Registration No. 1,635,466 granted on July 12, 1927, which I accessed and caused to be downloaded on or about May 18, 2019 via the U.S. Patent Office website at <http://patft.uspto.gov/netahtml/PTO/search-bool.html>. *Inter alia*, this patent states in part that it addresses a type of door known as a “‘cross buck’ panel door, because of its crossed, strengthening members extending diagonally.”

83. Attached hereto as **Exhibit 63** is a true and correct copy of United States Patent Registration No. Des. 437,074 for a design patent granted October 17, 2000, titled “S.U.V. Slant Back Cover,” which I accessed and caused to be downloaded on or about May 18, 2019 via the U.S. Patent Office website at <http://patft.uspto.gov/netahtml/PTO/search-bool.html>.

84. Attached hereto as **Exhibit 64** are true and correct copies of web pages depicting and offering for sale military “jerry cans” which I accessed and caused to be printed from the respectively indicated URLs on or about December 2, 2018.

85. Attached hereto as **Exhibit 65** are true and correct copies of a downloadable photograph and corresponding web page available on the website of the United States Postal Service, which I accessed and respectively caused to be downloaded and printed from the URL <https://about.usps.com/news/photos/delivery-details.htm?#p=2> on or about March 5, 2019.

86. Attached hereto as **Exhibit 66** are true and correct pages from a book titled “Humvee at War,” by Michael Green and Greg Stewart. *Inter alia*, this book states on page 71: “[The Humvee’s] rigid side doors are made from a fiberglass material reinforced with an embedded bulletproof-vest-type material called E-Glass, which bears a distinctive X-shaped stamping on the panel to increase rigidity.”

87. Attached hereto as **Exhibit 67** are true and correct pages from a book titled “HMMWV Humvee 1980-2005: US Army tactical vehicle,” by Steven J. Zaloga. *Inter alia*, this book states that the “angled back roof of the HMMWV M966 TOW carrier “was designed to protect the stowed missiles both from the weather as well as from the back-blast of the missile when launched.”

88. Attached hereto as **Exhibit 68** are true and correct copies of relevant excerpts from a “Convoy Operations Handbook” available on a website of the U.S. Marine Corps at the URL <https://www.trngcmd.marines.mil/Portals/207/Docs/TBS/MCRP%204-11-3f%20Convoy%20Operations%20Handbook.pdf>, which I accessed and caused to be downloaded on or about May 29, 2019. *Inter alia*, these pages discuss the nighttime use in military convoys of “blackout driving light[s]...mounted on the left front of the vehicle.”

X. Miscellaneous Evidentiary Topics

89. I prepared the document entered as Exhibit 56 to the Deposition of Lee Woodward taken in this action on February 1, 2019, which I understand is attached as Exhibit 20 to the Declaration of Marc E. Mayer. To prepare this exhibit I first took true and correct copies of an e-mail and PowerPoint attachment produced by AM General with Bates numbers AMG0059203 and AMG00592004-05. To these I appended a true and correct printout of the text file produced by AM General as the extracted text derived from the PowerPoint document, named AMG0059204.txt.

90. Attached hereto as **Exhibit 69** are true and correct copies of photographs of the exterior packaging of the two Construction Sets at issue in this action, taken by me on or about December 13, 2018.

91. Attached hereto as **Exhibit 70** are true and correct copies of images documenting the exterior packaging of various Call of Duty Construction Sets released since 2013. This exhibit was prepared by an individual working under my direction on or about April 25, 2019 and April 26, 2019.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 31st day of May, 2019, at Los Angeles, California.


James Berkley